SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 26 1967
JOHN F. DAVIS, CLERK

No. 852

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

IRENE COX, Administratrix of the Estate of RANDALL S. COX, Deceased,

Petitioner,

vs.

NORTHWEST AIRLINES, INC., a Minnesota Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OWEN RALL
IRVING G. SWENSON
JOHN W. MCCULLOUGH
135 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Respondent

PETERSON, LOWRY, RALL, BARBER & ROSS
135 South LaSalle Street
Chicago, Illinois 60603
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

Question Presented 1

Statute Involved 2

Statement of the Case 2

Reasons for Denying the Writ 3

CITATIONS

Cases

Allendorf v. Elgin J. & E. Ry. Co., 8 Ill. 2d 164, 133 N.E. 2d 288 (1956) 10

DeVito v. United Airlines, 98 F.Supp. 88 (E.D. N.Y. 1951) 7

Dice v. Akron, C. & Y. R. Co., 342 U.S. 359 (1951) 9

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) .. 9

Hall v. Chicago & N.W. Ry. Co., 5 Ill. 2d 135, 125 N.E. 2d 77 (1955) 10

LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266 (2d Cir. 1965) cert. den., 382 U.S. 878 (1965) 5, 7

Noel v. United Aircraft Corp., 219 F.Supp. 556 (D.C. Dela. 1963) 6

Noel v. United Aircraft Corp., 342 F.2d 232 (3d Cir. 1964) 5, 6

Noel v. United Aircraft Corp., 359 F.2d 671 (3d Cir. 1966) 6

Payne v. Baltimore & O. R. Co., 309 F.2d 546 (6th Cir. 1962) 8

Petition of Marina Mercante Nicaraguense, S.A. 364 F.2d 118 (2d Cir. 1966) cert. den. 386 U.S. 918 (1967) reh. den. 17 L.ed. 2d 803 (1967) 4, 5

PAGE

Petition of Midwest Towing Co., 203 F.Supp. 727 (E.D. Ill. 1962), affirmed as Midwest Towing Co. v. Richardson, 317 F.2d 270 (7th Cir. 1963) 7

United States v. Puscedu, 224 F.2d 5 (5th Cir. 1955) 8

STATUTES

Death on the High Seas Act, 46 U.S.C. §762 2

Federal Employers' Liability Act, 45 U.S.C. §51 et seq. 8, 9

Jones Act, 46 U.S.C. §688 ..... 7, 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 852

IRENE COX, Administratrix of the Estate of RANDALL S. COX, Deceased,

Petitioner,

vs.

NORTHWEST AIRLINES, INC., a Minnesota Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Did the Court of Appeals in this case properly require consideration of evidence concerning the impact of income taxes on probable future contributions in arriving at the pecuniary loss sustained by the survivors of the decedent, Randall S. Cox, in conformity with the appropriate measure of damages under the Death on the High Seas Act?

STATUTE INVOLVED

The pertinent provision of the Death on the High Seas Act is § 2, 46 U.S.C. § 762, and is as follows:

"§ 762 Amount and apportionment of recovery.

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought. (March 30, 1920, c. 111, § 2, 4 Stat. 537)."

STATEMENT OF THE CASE

Petitioner's Statement of the Case is misleading when it asserts that "The Court of Appeals held that . . . the measure of damages was the 'net income.'" (Pet. 5) The Opinion of the Court of Appeals clearly states that it was determining "'a fair and just compensation for the pecuniary loss sustained' by the widow and two minor children of the decedent. . . ." (Pet., p. 5a). Indeed, although the words "net income" happened to be employed by the Court of Appeals—and are seized upon by Petitioner to suggest that the Court did not comprehend the measure of damages under the Death on the High Seas Act—when this phrase is read in context, it is clear that the Court adhered to the statutory standard of "pecuniary loss". Thus, a complete statement should include the full reasoning of the Court of Appeals as follows:

> "No reduction was made [by the District Court in the case at bar] for income tax the decedent would have paid on the earnings and income so attributed to this twenty-year period [when his income would have ranged between $15,655 to $20,608 per year].

> The deceased's beneficiaries could not logically and reasonably have expected to receive the money he would have paid in such taxes had he lived. Only the net income would have been available for their support. And there can be no pecuniary loss of income which would not have been available for contribution." (Pet., pp. 4a-5a).

Petitioner requested a rehearing and rehearing *en banc* on the question of income tax deduction which was denied by the Court of Appeals sitting *en banc*.

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW PROPERLY REQUIRED CONSIDERATION OF THE IMPACT OF INCOME TAXES ON PROBABLE FUTURE CONTRIBUTIONS IN APPLYING THE APPROPRIATE MEASURE OF DAMAGES UNDER THE DEATH ON THE HIGH SEAS ACT.

The income tax issue in the case at bar is commonplace and the decision of the Court of Appeals to deny rehearing on the point was justified. The question is whether there are certain wrongful death actions where the impact of income taxes on the prospective future earnings of the deceased is great enough to justify their consideration in arriving at probable future contributions. Estimated income taxes paid by a decedent are evidentiary matters which may be weighed in determining what contributions might have been made to his survivors and are, thus, comparable to his life expectancy, earning power, past contributions, the age of his dependents, his prospects of advancement and promotion, loss of services to the spouse, his sobriety and industry, habits of saving and similar considerations. The decision of the Court of Appeals in the case at bar merely establishes certain

standards concerning when probable future tax payments should be considered. This problem is not unusual and the decision below of the Seventh Circuit is by no means anomalous. In fact, treating income taxes as analogous to life expectancy, earning power, and other evidentiary matters usually considered in determining pecuniary loss, would justify deduction of income taxes in all cases regardless of the amount.

As the Court of Appeals noted, it adopted the rationale of the Court of Appeals for the Second Circuit as "finally crystallized in *Petition of Marina Mercante Nicaraguense, S.A.*, 364 F.2d 118 (2d Cir. 1967)." (Pet., p. 5a). As a case which developed clear principles of decision concerning income tax deductions in arriving at probable future contributions, the *Marina* decision repays examination. Counsel for Petitioner erroneously suggests that it supports his position. (Pet. 3, 8, and 9) In *Marina*, Judge Friendly, writing for the Court, reversed a decision of a District Court which had deducted income taxes from probable future earnings ranging up to $11,500. (364 F.2d at 126) Such incomes were not considered great enough that "failure to deduct for taxes would result in an award that 'would be plainly excessive even after taking full account of the countervailing factors we have mentioned.' . . ." (364 F.2d at 125)

Petitioner, however, attempts to dismiss as "pure dictum" (Pet. 9) the rationale of the *Marina* holding which the Seventh Circuit properly recognized and adopted. The *Marina* opinion explained that "deduction should not be made in 'the great mass of litigation at the lower or middle reach of the income scale' . . . [but that] . . . illustrative examples where a reduction would be required were the cases of a plaintiff with 'potential earnings of $100,000 a year,' . . . [or] . . . where income taxes would

have taken 82% of the estimated earnings." (364 F.2d at 126) Moreover, the Court continued in *Marina* to state that the exception is not "limited to such extreme cases; indeed it has subsequently been held applicable to a geologist with estimated annual income of $16,000 and $25,000. *LeRoy* v. *Sabena Belgian World Airlines,* 344 F.2d 266, 276 (2nd Cir. 1965), cert. den., 382 U.S. 878 (1965)."

Judge Friendly goes on to note that the yearly incomes in the *Marina* case did not compare with "Dr. LeRoy's $16,000 to $25,000 estimated to produce total future income of some $600,000." (364 F.2d at 126). On the other hand, the estimated future earnings of Captain Cox, decedent in the case at bar, of approximately $623,000* and his estimated income "increasing to amounts ranging from $15,655 to $20,600 per annum" (Pet., p. 4a) for the twenty year period during which the Seventh Circuit required deduction is quite comparable to Dr. LeRoy's in the *LeRoy* case.

A thorough analysis of Petitioner's cases in support of her counsel's random arguments would consume more space than the original Petition. The Petition is filled with authority of questionable relevance presented without analysis and virtually no discussion of its pertinence. Indeed, one must be careful to separate holding from implication and implication from irrelevancy in the cases cited. An interesting example is the argument, at page 6 of the Petition, that the measure of damages under the Death on the High Seas Act is "pecuniary loss" not "net income" and, therefore, on the authority of *Noel* v. *United*

---

* This figure is the total of active duty and retirement pay, *i.e.,* $493,674.33, Petitioner's (Libellant below) Ex. 1, and the $10,000 per year for 13 years to be earned in the Captain's civilian career after retirement from the service, as found by the District Court in Finding 27.

Aircraft Corp., 342 F.2d 232 (3d Cir. 1965), which Petitioner states "needs no further elucidation" (Pet. 6), income taxes should not be considered in determining pecuniary loss. Proceeding from this premise, the *Noel* case is described as holding that "income tax computations must be excluded in computing damages in an action under the Death on the High Seas Act" (Pet. 3); as a case in which a District Court was "reversed for . . . [the] . . . specific reason" (Pet. 8) that it considered the element of federal taxation; and as proof that income taxes are not deducted "even in the case of large earners in actions under this statute, . . ." (Pet. 9)

In fact none of the three opinions involved, one by the District Court and two by the Court of Appeals,* mentions the propriety of deducting income taxes in arriving at pecuniary loss. The Court of Appeals in *Noel* did not reverse the lower Court because of consideration given to the impact of income tax. The opinion, at 342 F.2d 239, reversed the lower court's finding that the deceased would likely have had no net income for the first five years of his life expectancy because of uncertain business developments, which finding was "without evidential basis," "wholly speculative," and, therefore, "clearly erroneous." (342 F.2d at 239) It was found that there was evidence to support a finding that the deceased would have had earnings during that period and would have contributed to his survivors even though that might require living beyond his means; and, thus, the District Court improperly employed a standard of "net income"

* *Noel* v. *United Aircraft Corp.*, 342 F.2d 232 (3d Cir. 1964) affirming in part 219 F.Supp. 556 (D.C. Dela. 1963) and remanding for consideration of damages. *Noel* v. *United Aircraft Corp.*, 359 F.2d 671 (3d Cir. 1966) remanding with instructions to proceed in accordance with initial decision of the Court of Appeals.

when that consists of speculation as to profits and losses which might result from business ventures. The case had nothing to do with income taxes. The "net income" discussion related not to a deduction of income taxes but rather to the decedent's probable lack of success in a business venture.

Petitioner's argument that District Courts which have provided for deduction of income taxes under the Death on the High Seas Act uniformly have been reversed is deceptive because the cases cited did not involve prospective incomes large enough to justify adjustment by deduction of income taxes in arriving at the decedent's future contributions to his survivors. Petitioner admits that the measure of damages under the statute here involved is similar to that in wrongful death actions under the Jones Act. (Pet. 9) Yet in *Petition of Midwest Towing Co.*, 203 F. Supp. 727, 733 (E.D. Ill. 1962), affirmed as *Midwest Towing Co.* v. *Richardson*, 317 F.2d 270 (7th Cir. 1963), a wrongful death case brought under the Jones Act (46 U.S.C. §688), the District Court deducted taxes without comment and this was not contested on appeal by counsel for Petitioner in the case at bar who was the plaintiff's counsel in that case. Other cases in which District Courts have provided for deduction of income taxes and were not reversed are *DeVito* v. *United Airlines*, 98 F.Supp. 88, 99-100 (E.D.N.Y. 1951) and *LeRoy* v. *Sabena Belgian World Airlines*, 344 F.2d 266, 276 (2d Cir. 1965), cert. den. 382 U.S. 878 (1965). While these cases were not actions under the Death on the High Seas Act, there is no evidence in these cases that the decision to deduct income taxes was considered required by or limited to the statute involved. And, as has been seen above, the *LeRoy* case was cited with approval in *Petition of Marina Mercante Nicaraquense, S. A.*, 364 F.2d 118 (2d Cir. 1966) as an illustrative

example of cases wherein a deduction is proper. *Marina* was an action under the Death on the High Seas Act and the Second Circuit in that case recognized no inherent limit on income tax deductions in the Act itself or the cases interpreting it; limits may be imposed, however, by the amount of prospective future earnings. The decision of the Court of Appeals in the case at bar correctly held that the decedent's large prospective income required a deduction for income taxes in order to arrive at the amount of his probable contributions to his survivors.

In fact, "further elucidation" of the cases Petitioner cites as authority for the position that District Courts must not consider the element of income taxes in computing damages destroys the argument. *United States* v. *Puscedu* 224 F.2d 5 (5th Cir. 1955) (Pet. 3 and 8) and *Payne* v. *Baltimore & Ohio R. Co.* 309 F.2d 546 (6th Cir. 1962) (Pet. 3), for example, supposedly support the argument with reference to the Death on the High Seas Act and the Federal Employers' Liability Act (45 U.S.C. §51, *et seq.*), respectively. *Puscedu,* however, merely footnotes findings of a District Court where it appeared that taxes were not considered in arriving at the award. This does not indicate that the Fifth Circuit "specifically held that income tax computations must be excluded in computing damages in an action under the Death on the High Seas Act." (Pet. 3) *Payne* is simply irrelevant. The issue before the Sixth Circuit in *Payne* was whether the jury should be instructed that the plaintiff's award would not be subject to income tax and it was held that the instruction was properly refused. Throughout the argument, Petitioner has confused the issue involved in the case at bar regarding the deduction of income taxes in computing pecuniary loss, with instructions to a jury concerning a plaintiff's tax

liability on any amount awarded by the jury. This mistake is made, for example, with respect to the contention that the decision below will adversely affect uniform administration of federal wrongful death statutes within the State of Illinois.

II. THE HOLDING OF THE COURT OF APPEALS REGARDING INCOME TAXES DOES NOT IMPEDE UNIFORM ADMINISTRATION OF FEDERAL STATUTES WITHIN THE STATE OF ILLINOIS.

Petitioner argues (Pet. 9-10) that when the Court of Appeals in the case at bar provided for deduction of income taxes in arriving at the pecuniary loss suffered by the deceased's survivors, it disrupted the uniform administration by State and Federal Courts of federal statutes having the same measure of damages. Asserting that the Federal Employers' Liability Act and the Jones Act provide for a determination of pecuniary loss, counsel for Petitioner urges that income taxes may not be deducted in actions brought in Illinois state courts under these statutes whereas in Federal District Courts such deduction is required in appropriate cases by the opinion of the Court of Appeals in the instant case interpreting the Death on the High Seas Act, also a pecuniary loss statute. The short answer to Petitioner's argument is that uniformity can be achieved by the Courts of the State of Illinois following federal decisions interpreting statutes of the United States. See: *Garrett* v. *Moore-McCormack Co.* 317 U.S. 239, 243-245 (1942) (a decision asserting the primacy of federal law in achieving uniform administration of the Jones Act) and *Dice* v. *Akron, C. & Y. R. Co.* 342 U.S. 359, 361-62 (1951) (a decision establishing the same principle for the Federal Employers' Liability Act).

Petitioner lists two Illinois cases for the proposition that Illinois decisions prohibit the deduction of income taxes in arriving at pecuniary loss. Neither case does so.

Hall v. *Chicago & N. W. Ry. Co.*, 5 Ill. 2d 135, 125 N.E. 2d 77 (1955) was not a wrongful death action and the question of deduction of probable future income taxes was not discussed or decided. The *Hall* case held only that remarks of counsel to a jury that a personal injury damage award is not taxable are prejudicial and the basis for a new trial (5 Ill. 2d 135, at 149 and 152, 125 N.E. 2d 77 at 85 and 86 (1955)). *Allendorf* v. *Elgin J. & E. Ry. Co.* 8 Ill. 2d 164, 133 N.E. 8d 288 (1956), the second case cited, peripherally discusses the issue of tax deduction but contains no holding on the subject. The Court in *Allendorf* remarked that actuarial testimony concerning present value of future contributions after deduction of taxes was "needlessly favorable" in light of *Hall.* (See 8 Ill. 2d 164 at 181, 133 N.E. 2d 288 at 296 (1956)) This was merely dicta arising from an inapposite holding in the prior case and an apparent misapprehension by the Court in *Allendorf* of the matter decided in *Hall.* These two cases are not worthy of consideration on the precise point at issue in the case at bar.

CONCLUSION

Because the Petition presents no question worthy of review by this Court and the arguments it advances are unsupported by the very authority relied upon, the writ should be denied.

Respectfully submitted,

Owen Rall
Irving G. Swenson
John W. McCullough

Peterson, Lowry, Rall, Barber & Ross
Of Counsel

December 22, 1967